UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 102

Docket No. CB-7121-13-0111-V-1

Maria Lavinia Jones,

Appellant,

v.

Department of Energy,

Agency.

December 31, 2013

Maria Lavinia Jones, Cheltenham, Maryland, pro se.

Jocelyn Richards and Victoria Bernhardt, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 Pursuant to 5 U.S.C. § 7121(d), the appellant has filed a request for review of an arbitration decision affirming her removal. For the reasons that follow, the appellant's request for review is DISMISSED for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed an initial appeal with the Board's Washington Regional Office on December 2, 2012, challenging her removal. *See Jones v. Department of Energy*, MSPB Docket No. DC-0752-13-0168-I-1, Initial Appeal File (IAF-0168), Tab 1. After conferring with the parties, the administrative judge

forwarded the appellant's initial appeal to the Clerk of the Board to be docketed as a request for review of an arbitration decision.[1] *See* IAF-0168, Tab 41; *Brent v. Department of Justice*, 100 M.S.P.R. 586, ¶ 6 (2005) (explaining that a request for review filed with an administrative judge should be forwarded to the full Board for review), *aff'd*, 213 F. App'x 993 (Fed. Cir. 2007). In addition to requesting that the Board review the arbitrator's decision affirming her removal, the appellant has also raised an equal employment opportunity (EEO) retaliation claim in connection with her removal for the first time with the Board. *See* Request for Review (RFR) File, Tab 6 at 4-11; *see also* RFR File, Tab 33 at 2 (agency submission noting that "Appellant subsequently appealed the Arbitrator's decision to the MSPB, and also, for the first time, alleged reprisal in response to the AJ's Order on Jurisdiction, dated February 14, 2013."); IAF-0168, Tab 6, Subtab 4a (arbitration decision). The agency has filed an opposition to the appellant's request for review. RFR File, Tab 33.

ANALYSIS

The Board lacks jurisdiction over the appellant's request for review of the arbitration decision because the appellant could have, but did not, raise her discrimination claim with the arbitrator in the grievance proceeding under 5 C.F.R. § 1201.155(c).

¶3 Section 7121(d) of Title 5 of the U.S. Code empowers the Board to review arbitration decisions under certain circumstances. *See Sadiq v. Department of Veterans Affairs*, 119 M.S.P.R. 450, ¶ 4 (2013). The Board has explained that it

[1] The administrative judge also construed the appellant's initial appeal as raising a claim of an involuntary retirement and retained that portion of the appellant's initial appeal, noting that "it is clear that the appellant's involuntary retirement claim was not raised before the arbitrator[.]" IAF-0168, Tab 41 at 2. The administrative judge subsequently dismissed the appellant's involuntary retirement appeal for lack of jurisdiction, *see* IAF-0168, Tab 42, and the appellant has filed a petition for review of that initial decision which is being processed separately, *see* Petition for Review File in DC-0752-13-0168-I-1, Tab 1.

has jurisdiction to review an arbitration decision when the subject matter of the grievance is one over which the Board has jurisdiction, the appellant has alleged discrimination under 5 U.S.C. § 2302(b)(1)[2] in connection with the challenged action, and a final decision has been issued. *See Sadiq*, 119 M.S.P.R. 450, ¶ 4. The Board's review of an arbitrator's award is limited, and arbitral awards are entitled to a greater degree of deference than initial decisions issued by the Board's administrative judges. *Id.*, ¶ 5. Because of the highly deferential standard accorded to arbitration decisions, an appellant who is dissatisfied with an arbitrator's decision generally may not seek to set aside or modify that decision on a ground not raised before the arbitrator. *See, e.g., Means v. Department of Labor*, 60 M.S.P.R. 108, 115-16 (1993).

¶4 Prior to the Federal Circuit's decision in *Jones v. Department of the Navy*, 898 F.2d 133 (Fed. Cir. 1990), the Board applied this principle to discrimination claims raised for the first time in an appellant's request for review of an arbitration decision. *See, e.g., Salinas v. Immigration & Naturalization Service*, 34 M.S.P.R. 553, 554-55 (1987) (citing Board authority for the proposition that "the Board may review an arbitrator's decision only where prohibited discrimination was raised to the arbitrator."), *aff'd*, 846 F.2d 77 (Fed. Cir. 1988) (Table). Under this approach, the Board had held that it lacked jurisdiction over a request for review of an arbitrator's decision when an appellant failed to raise a claim of discrimination before the arbitrator. *Id*. In *Jones*, however, the Federal Circuit concluded that an employee did not have to raise a discrimination claim before an arbitrator in order to raise such a claim with the Board for the first time when requesting review of an arbitration award. *See Jones*, 898 F.2d at 136.

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[2] A claim of EEO retaliation is cognizable under 5 U.S.C. § 2302(b)(1)(A). *Rhee v. Department of the Treasury*, 117 M.S.P.R. 640, ¶ 20 (2012).

¶5 Subsequent to *Jones*, the Board held that an employee could "raise a discrimination claim for the first time with the Board in an arbitration review proceeding," even if such a claim was not presented to the arbitrator. *Means*, 60 M.S.P.R. at 115 (citing *Jones*, 898 F.3d at 135). The Board articulated the following test for establishing jurisdiction over a request for review of an arbitration decision: (1) the subject matter of the grievance is one over which the Board has jurisdiction; (2) the grievant alleges discrimination under 5 U.S.C. § 2302(b)(1) in connection with the challenged action; and (3) a final decision has been issued. *See, e.g.*, *Colon v. Department of Veterans Affairs*, 73 M.S.P.R. 659, 662-63 (1997).[3]

¶6 On June 7, 2012, however, the Board proposed changes to its regulations concerning, inter alia, the Board's jurisdiction over requests for review of arbitration decisions under 5 U.S.C. § 7121(d). *See* 77 Fed. Reg. 33663, 33669 (June 7, 2012). In its notice of proposed rulemaking, the Board explained that it "was not always the case" that "the Board ha[d] jurisdiction to review arbitration decisions in which an appellant is raising claims of unlawful discrimination, even when the appellant failed to raise the discrimination issue before the arbitrator," and we noted that the "Board had held that its review was limited to discrimination claims that were raised before the arbitrator until the Federal Circuit's contrary ruling in *Jones*[.]" *Id*. Thus, to "restore the rule that existed prior to the Federal Circuit's decision in *Jones*," *id.*, the Board proposed amending 5 C.F.R. § 1201.155 as follows:

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[3] In *Colon*, we expressly noted that "the appellant (although she did not do so before the arbitrator) has alleged in her request for review that the removal action taken against her was the result of discrimination," and we held that such an allegation was properly before the Board on a request for review and could establish the Board's jurisdiction over her request. 73 M.S.P.R. 659, 663.

> (b) Scope of Board Review. If the negotiated grievance procedure permits allegations of discrimination, the Board will review only those claims of discrimination that were raised in the negotiated grievance procedure. If the negotiated grievance procedure does not permit allegations of discrimination to be raised, the appellant may raise such claims before the Board.

77 Fed. Reg. at 33679.

¶7 The Board's proposed rule changes became final on October 12, 2012, and went into effect on November 13, 2012. *See* 77 Fed. Reg. 62350, 62360 (Oct. 12, 2012) (explaining that the proposed amendment would take effect and be codified at 5 C.F.R. § 1201.155(c)). Thus, as the Board explained in both its notice of proposed rulemaking and notice of final rulemaking, the changes in the Board's jurisdictional regulations governing requests for review of arbitration decisions were designed to "restore the rule that existed prior to the Federal Circuit's decision in *Jones*," 77 Fed. Reg. 33663, 33669, and that "[i]f the Board were to adjudicate a claim of discrimination that could have been but was not raised to the arbitrator, it would not be reviewing the arbitrator's final decision with respect to that claim; it would be adjudicating the claim de novo," 77 Fed. Reg. 62350, 62360.[4]

¶8 Under the Board's revised regulations, an appellant can establish the Board's jurisdiction over a request for review of an arbitration decision when: (1) the subject matter of the grievance is one over which the Board has

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[4] The Federal Circuit premised its decision in *Jones* on, inter alia, the fact that "no statute or regulation . . . requires an issue of prohibited discrimination . . . to be first raised before an arbitrator before the board has jurisdiction to consider it on appeal," and that "the regulations of the board governing the procedures involving appeals containing allegations of prohibited discrimination . . . are dispositive of this question." 898 F.2d at 135. In response to these observations, the Board's revised regulation now expressly provides that a claim of discrimination must be first presented to an arbitrator before it can be raised in a request for review, provided that the governing negotiated grievance procedure allows for claims of discrimination to be presented in arbitration. 5 C.F.R. § 1201.155(c).

jurisdiction; (2) the appellant either (i) raised a claim of discrimination under 5 U.S.C. § 2302(b)(1) with the arbitrator in connection with the underlying action, or (ii) raises a claim of discrimination in connection with the underlying action under 5 U.S.C. § 2302(b)(1) for the first time with the Board if such allegations could not be raised in the negotiated grievance procedure; and (3) a final decision has been issued. 5 C.F.R. § 1201.155(a)(1), (c); *see also McCurn v. Department of Defense*, 119 M.S.P.R. 226, ¶ 5 n.4 (2013) ("Under the Board's regulations that became effective November 13, 2012, the Board will only review discrimination claims raised for the first time in a request for review of an arbitration decision if the negotiated grievance procedure did not permit allegations of discrimination to be raised.") (citing 5 C.F.R. § 1201.155(c)).

¶9 Applying this jurisdictional standard, we conclude that the appellant cannot establish Board jurisdiction over her request for review of the arbitrator's decision. The record reflects that the appellant's governing collective bargaining agreement allows for claims of discrimination to be raised in the course of a grievance proceeding. *See* IAF-0168, Tab 6, Subtab 4h at 50 ("Section 11.03 – Any aggrieved employee affected by discrimination, a removal, or performance-based reduction in grade, or other adverse action, may, at his/her option, raise the matter under a statutory appeal procedure or under this negotiated grievance procedure, but not both."). The record further reflects that the appellant did not raise a claim of discrimination under 5 U.S.C. § 2302(b)(1) in the course of her grievance proceeding. *See* RFR File, Tabs 6 and 33; IAF-0168, Tab 6, Subtab 4a.

¶10 Accordingly, because the appellant could have raised her claim of discrimination in the grievance proceeding, but did not, the appellant cannot now raise such a claim for the first time with the Board in connection with her request

for review. 5 C.F.R. § 1201.155(c). The appellant's request for review of the arbitrator's decision is therefore DISMISSED for lack of jurisdiction.[5]

ORDER

¶11 For the above-stated reasons, the appellant's request for review is DISMISSED for lack of jurisdiction. This is the final decision of the Merit Systems Protection Board in this matter. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in

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[5] We note that the appellant filed her initial appeal, which was forwarded for processing as a request for review, with the Board's regional office on December 2, 2012, several weeks after our revised regulations went into effect. We find no reason not to apply our revised regulations to this request for review.

Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.